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IN THE
COURT OF APPEALS OF INDIANA

ROBERT A. WELLINSKI,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 46A03-0605-CV-197
	)	
JOY M. WELLINSKI, n/k/a JOY BARNES,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE LA PORTE CIRCUIT COURT
The Honorable Thomas Pawloski, Magistrate
The Honorable Robert W. Gilmore, Jr., Judge
Cause No. 46C01-9705-DR-192

February 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Robert A. Wellinski appeals the trial court's denial of his motion to modify physical custody. Robert raises three issues, which we consolidate and restate as: whether the trial court abused its discretion in denying Robert's motion to modify physical custody based on his ex-wife's relocation. Finding that the trial court acted within its discretion, we affirm.

Facts and Procedural History

When Robert and Joy Wellinski, n/k/a Joy Barnes, divorced on September 26, 1997, they entered into a "Final Property Settlement Agreement" (the "Agreement"), under which they agreed that they would have joint custody of their three children, A.W., M.W., and J.W., and that Joy would be the "residential parent." Appellant's Appendix at 5. The Agreement identified specific times at which Robert would have visitation, and allowed that he could have additional visitation if the parties agreed. No action was taken relating to this Agreement until April 2004, when Robert filed a Verified Motion for Modification of Child Custody Order. Robert filed this motion when he learned that Joy planned on moving from LaPorte, Indiana, to Schererville, Indiana, roughly forty miles away.[1] In June 2004, Robert filed a Motion for Custody Evaluation, and on July 7, 2004, the trial court conducted a hearing on this motion and reset the matter for September 3, 2004. At the September 3 hearing, the matter was continued and another hearing was held on November 18, 2004. Following the November 18 hearing, the trial court ordered that the parties undergo a custody

[1] Under current law, an individual who has been awarded custody or visitation time with a child must file a notice of intent to move with the clerk of the court that awarded the custody or visitation and send a copy of the notice to any nonrelocating person who has custody or visitation rights. Ind. Code § 31-14-13-10. At the time Joy moved, in June 2004, such notice was required only if the move was

evaluation. On March 31, 2006,[2] the trial court entered an order denying Robert's motion. Robert now appeals. Additional facts will be provided as required.

Discussion and Decision

I. Standard of Review

In this case, Joy did not file an appellee's brief, thereby altering our standard of review. When an appellee fails to submit a brief, we will not "undertake the burden of developing arguments for the appellee." In re Paternity of B.D.D., 779 N.E.2d 9, 13 (Ind. Ct. App. 2002). In these situations, "[w]e apply a less stringent standard of review with respect to showings of reversible error, and we may reverse the trial court's decision if the appellant can establish prima facie error." Id. In this context, prima facie error is defined as "at first sight, on first appearance, or on the face of it." Id. (citations omitted). We will affirm unless an appellant can show such error. Id.

We generally review custody modifications for an abuse of discretion, as we have a "preference for granting latitude and deference to our trial judges in family law matters." Apter v. Ross, 781 N.E.2d 744, 757 (Ind. Ct.App. 2003), trans. denied (quoting Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002)). We will not reweigh the evidence or judge the credibility of the witnesses. Green v. Green, 843 N.E.2d 23, 26 (Ind. Ct. App. 2006). Instead, we will consider only the evidence most favorable to the judgment and will make any reasonable inferences from that evidence. Id.

The trial court in this case entered findings of fact and conclusions of law, so we apply

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outside of Indiana or at least one hundred miles from the current county of residence.

a two-tiered standard in reviewing the trial court's decision. "First, we determine whether the evidence supports the findings and second, whether the findings support the judgment." Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001). We will reverse only if no evidence supports the findings or the findings do not support the judgment. B.D.D., 779 N.E.2d at 13.

II. Trial Court's Denial of Robert's Motion to Modify Custody

Robert properly recognizes that Joy's relocation, by itself, does not warrant a modification to the custody arrangement. See Lamb v. Wenning, 600 N.E.2d 96, 98-99 (Ind. 1992). Instead, when determining whether a change in custody is warranted, we recognize "it is the effect of the move upon the child that renders a relocation substantial or inconsequential – i.e., against or in line with the child's best interests." Green, 843 N.E.2d at 27. That is, "[t]he change in conditions must be judged in the context of the whole environment." Lamb, 600 N.E.2d at 99. Our legislature has recognized the importance of trial courts considering all relevant circumstances surrounding a custodial arrangement by mandating that trial courts consider a wide variety of factors before modifying custody, and instructs:

> (a) The court may not modify a child custody order unless:
>
> (1) the modification is in the best interests of the child; and
>
> (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 8 and, if applicable, section 8.5 of this chapter.
>
> (b) In making its determination, the court shall consider the factors listed under section 8 of this chapter.

Ind. Code § 31-17-2-21. The factors that the court shall consider include the following:

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[2] This lapse of time was apparently due in part to conflicts with the appointed evaluators.

(1) The age and sex of the child.
(2) The wishes of the child's parent or parents.
(3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
(4) The interaction and interrelationship of the child with:
    (A) the child's parent or parents;
    (B) the child's sibling; and
    (C) any other person who may significantly affect the child's best interests.
(5) The child's adjustment to the child's:
    (A) home;
    (B) school; and
    (C) community.
(6) The mental and physical health of all individuals involved.
(7) Evidence of a pattern of domestic or family violence by either parent.

Ind. Code § 31-17-2-8.

As indicated by the plain language of the statute, a trial court has a statutory duty to consider these factors, and evidence that the trial court failed to consider or weigh a relevant factor can require reversal. See Green, 843 N.E.2d at 29 (finding trial court abused its discretion by ignoring factors listed in Indiana Code section 31-17-2-8). Robert argues that the trial court "appeared to ignore evidence relating to the children's interaction and relationship with their father, and their adjustment to their home, school and community." Appellant's Brief at 13-14. The trial court's findings include the following:

> 5. [Robert's] flexible work schedule allowed him to have the children at his residence virtually every day after school, as contemplated in the visitation scheme and Robert regularly exercised his visitation as otherwise set out in the settlement agreement.
> 6. Prior to June, 2004, Robert had an opportunity to be very active and involved in the children's school activities and extracurricular activities . . .
> ***
> 14. The Court notes that the children are now entering an age where they are seeking their own independence and that peer-based relations and school activities become more important than activities with parents.
> 15. The three children testified in Court … :

A) [A.W.] testified that he likes his new school and is making more friends than he had in LaPorte. He is engaged in sports, has his own room, and is getting along with his siblings. While he is happy that he moved, he believes that his father is trying to understand him more. In general, he is satisfied with the current arrangement.
B) [M.W.] testified that things were good; he was engaged in soccer; and getting along well. He is satisfied in both homes and wants things left as they are.
C) [J.W.] testified that she is engaged in Girl Scouts and prefers her current living arrangement. She is happy in either home.

16. [Two of the children] would appreciate an opportunity to have . . . mid-week visits with Robert and would appreciate phone calls on occasion. The two boys are finding their new school system slightly more challenging than LaPorte, Indiana.

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20. Americans are by nature highly mobile and in this instance a move of 50 miles from LaPorte, considering the excellent east-west highways we have in this area, is not such an enormous burden.

21. During the custody evaluation, [Robert] identified difficulties between himself and the children and sought advice from the evaluator as to how to solve these problems. He applied this advice and, I believe, gained much insight into his own children.

Appellant's App. at 16-18.

It is clear from the trial court's findings that it considered the children's relationship with Robert and the children's adjustment to their home and community. The court recognized that Robert actively participated in his children's lives, and that the move had an effect on this participation. The court also recognized the relative proximity of Schererville to LaPorte, and noted that the distance does not impose as significant a burden on Robert's ability to see the children as a move to a more remote location.[3] Finally, the trial court

[3] We cannot agree with Robert that "[w]hether [Joy] moved to Schererville, or to Hawaii, the impact on the children was the same." Obviously, a change from LaPorte to Schererville is not as significant a change as LaPorte to Hawaii in terms of culture, landscape, climate, or a myriad of other factors. Most importantly, in Schererville, the children are roughly a one-hour drive from their father and extended family.

considered the effect that the move had on the children's school and social life, and found that the children were generally well-adjusted to both Schererville and LaPorte. We conclude that the trial court examined all relevant factors relating to the change in circumstances as required by statute. Pursuant to this examination, the trial court also explicitly found that it was in the children's best interests to deny Robert's petition.[4] Given the deference we afford trial courts in the arena of child custody, we cannot say that the trial court abused its discretion in making this determination.

Robert also argues, "the trial court improperly denied the children the benefit of their father's authority and responsibility for their upbringing, which are guaranteed by his status as joint custodial parent." Appellant's Br. at 14. Pursuant to the Agreement, Joy and Robert have joint legal custody of their children. This Agreement is a binding contract, and the State of Indiana's public policy encourages parties to enter into such agreements. Mundon v. Mundon, 703 N.E.2d 1130, 1134 (Ind. Ct. App. 1999). "Joint legal custody . . . means that the persons awarded joint custody will share authority and responsibility for the major decisions concerning the child's upbringing, including the child's education, health care, and religious training." Ind. Code § 31-9-2-67; see also Tarry v. Mason, 710 N.E.2d 215, 217 (Ind. Ct. App. 1999), trans. denied. In these custody arrangements, "it is critically important that the parents demonstrate the ability to work together for a common purpose, i.e., the

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This relatively short distance does not impose anywhere near the burden on the children's access to Robert and the rest of their extended family in LaPorte as would the distance of over four thousand miles between LaPorte and Hawaii, requiring travel by plane or boat and considerable time and expense.

[4] The trial court's Order states: "Having examined the criteria set forth in I.C. 31-17-2-8, including the testimony of the parties' children in Court, the custody evaluation, and all other testimony, the Court finds that the best interests of the children would be served by denying the husband's Petition for Modification of

child's best interests." Arms v. Arms, 803 N.E.2d 1201, 1211 (Ind. Ct. App. 2004). Joy's actions in unilaterally deciding to move, and thereby change the children's schools, health care providers, and church are not consistent with a joint custodial relationship and clearly violate the terms of the Agreement. Cf. Tarry, 710 N.E.2d at 217 (holding that when joint custodial parents cannot agree on school selection, parent with physical custody's opinion is not controlling because parents with joint custody share authority for such decisions).

Joy's actions taken along with her decision to move the children also constitute a clear and intentional violation of the Agreement's visitation clause. Section 3 of the Agreement states that "husband may pick up the children from day care and/or school every work day and keep the children until 5:30 p.m., unless Wife's work schedule or residence should change such that she is able to pick up the children by 4:00 p.m." Appellant's Br. at 5. By moving the children to Schererville, Joy obstructed Robert's visitation rights, again willfully violating a binding agreement and an order of the trial court. See Ind. Code § 35-15-2-17(b); cf. Ind. Parenting Time Guidelines § 1(C)(1) ("Parenting time is both a right and a responsibility, and scheduled parenting time shall occur as planned."). Such a unilateral action is also clearly at odds with public policy. See Ind. Parenting Time Guidelines § 1(E)(4) ("When either parent considers a change of residence, reasonable advance notice of the intent to move shall be provided to the other parent so they can discuss necessary changes in the parenting schedule"); id., Commentary 1 ("Parents should recognize the impact that a change of residence may have on a child and on the established parenting time. The welfare of the child should be a priority in making the decision to move.")

Custody." Id. at 18.

However, it does not follow that Joy's failure to follow the terms of the Agreement necessarily requires modification to the custody arrangement.[5] See Pierce, 620 N.E.2d at 730 (recognizing that to base a modification of custody upon a party's failure to comply with a custody agreement "would impermissibly punish a parent for noncompliance with a custody agreement"). In order for a trial court to modify a custody arrangement, the change must also be in the best interests of the children. See Mundon, 703 N.E.2d at 1135 (although wife's failure to conform to parties' settlement agreement was evidence of a substantial change in a factor in Indiana Code section 31-17-2-8, modification was not a proper remedy absent a showing that modification was in child's best interests). As discussed above, the trial court did not abuse its discretion in determining that the children's best interests are served by denying Robert's motion to modify custody.[6] Therefore, although Joy's actions clearly deprived Robert of his legal rights as a joint-custodial parent, such deprivation does not require that the trial court modify the custody arrangement, and the trial court did not abuse its discretion in denying Robert's petition.

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[5] We note that Robert did not seek a modification of the joint legal custody arrangement, and sought a modification only of Joy's status as "residential parent." We express no opinion as to whether Joy's violations of the Agreement or her move to Schererville make the continuation of a joint legal custody arrangement unreasonable. See Carmichael, 754 N.E.2d at 635 ("The issue in determining whether joint legal custody is appropriate is not the parties' respective parenting skills, but their ability to work together for the best interests of their children."); Pierce v. Pierce, 620 N.E.2d 726, 730 (Ind. Ct. App. 1993), trans. denied (recognizing that different considerations apply to decisions regarding joint custody than to decisions regarding changing the parent with primary or sole custody).

[6] Because the trial court found that a modification was not in the children's best interests, we need not determine whether Joy's violation of the custody agreement constituted a "substantial change" pursuant to Indiana Code section 31-17-2-8. See Williamson v. Williamson, 825 N.E.2d 33, 43 (Ind. Ct. App. 2005) (although a "lack of cooperation or isolated acts of misconduct by a custodial parent cannot serve as a basis for the modification of child custody," an "egregious" violation of a custody agreement could be considered a substantial change).

Finally, Robert argues that the trial court's decision is contrary to public policy, which he states favors stability and "recognizes that children's best interests are served by having frequent, meaningful and continuing contact with both parents." Appellant's Br. at 15. We agree with Robert that public policy favors children having stability and meaningful contact with both parents. See Indiana Parenting Time Guidelines, Preamble. However, we do not agree with Robert that the trial court's decision forecloses the possibility that the children continue to have meaningful contact with both parents. Although we recognize the apparent inequity of Robert being deprived of his visitation time due to Joy's unilateral actions, the trial court was aware that Robert had lost parenting time due to Joy and the children's relocation, and attempted to take this factor into consideration when it terminated the Agreement's visitation provision and ordered a new visitation schedule.[7] In terms of the new visitation schedule, the trial court stated in its order:

> The Court believes that the Indiana Parenting Time Guidelines should be implemented and utilized between the parties. Both parties will have to be flexible and communicative on parenting time, as the children now have many new interests. However, the activities of the children should not become so onerous that they prevent parenting time by the husband. Again, mid-week visitation, if it can be arranged, is desirable. It is most probable that this would be most easiest [sic] during the summer months when the children are not in school. Also, the husband should plan to exercise extended parenting time with the children during the summer months and spring vacations.

[7] Nothing before us indicates that Joy instituted any proceeding to modify the visitation arrangement. However, during direct examination, Joy stated that she was seeking "[m]aintaining residential custody and . . . altering the visitations to Friday, Saturday and Sunday. And if once during the week whenever is within his time frame and the children's. As long as it doesn't interfere with the children's activities or he is looking at the activities with them, I never had a problem." Transcript at 171. Although the trial court never explicitly terminated the visitation schedule contained in the Agreement, such a schedule would be in direct conflict with the visitation provision of the trial court's order, and we therefore deem the Agreement's visitation provision terminated.

Appellant's App. at 18.[8]

As discussed above, the fifty-mile distance between Schererville and LaPorte does not impose an onerous burden on Robert's ability to see his children. We note that the same burden would be placed on Joy's ability to see the children were the trial court to have granted Robert's petition. Also, although the change in residence may have some affect on the children's stability, a change in residential parent also affects stability. See Pierce, 620 N.E.2d at 730. We conclude that the trial court's decision to deny Robert's petition is not so contrary to the public policy of ensuring children's stability and meaningful contact with both parents as to warrant reversal.

In affirming the trial court's decision, we emphasize that we are not condoning Joy's actions. It is contrary to public policy to allow parties to violate the terms of separation agreements. See Pond v. Pond, 700 N.E.2d 1130, 1136 (Ind. 1998); Mundon, 703 N.E.2d at 1134; Thomas v. Abel, 688 N.E.2d 197, 200 (Ind. Ct. App. 1997); Ind. Parenting Time Guidelines §1(E)(5) ("Neither parenting time nor child support shall be withheld because of either parent's failure to comply with a court order. . . . If there is a violation of either requirement, the remedy is to apply to the court for appropriate sanctions."). Indeed, we have previously upheld findings of contempt for violations of such agreements. See In re P.E.M., 818 N.E.2d 32, 39 (Ind. Ct. App. 2004) (affirming trial court's finding of contempt based on

[8] We recognize the ambiguous and indefinite nature of these and other statements in the trial court's order. We encourage the trial court to use more definite terms in its order so as to avoid confusion and to provide the parties with the direction they seek when taking their troubles to the legal system. See Bowyer v. Ind. Dept. of Natural Res., 798 N.E.2d 912, 918-19 (Ind. Ct. App. 2003) (trial court abused discretion for finding that party violated trial court's temporary restraining order when order was ambiguous and indefinite); Speaker v. Speaker, 759 N.E.2d 1174, 1179-80 (Ind. Ct. App. 2001) (finding ambiguity in trial court's custody order and remanding for clarification).

evidence that the father was aware of the grandparental visitation order and willfully disobeyed it); Malicoat v. Wolf, 792 N.E.2d 89, 92-93 (Ind. Ct. App. 2003) (holding that trial court properly found mother in contempt for her "willful disobedience in making the children unavailable for visitation with Father"); cf. Burrell v. Lewis, 743 N.E.2d 1207, 1213 (Ind. Ct. App. 2001) (holding that father could not be held in contempt because "in order for a party to be found in contempt for failing to comply with a visitation order, the order must specifically set forth the time, place and circumstances of the visitation"). Other remedies for violations of court orders relating to visitation time include injunctive relief, criminal penalties, and attorney's fees. See Ind. Parenting Time Guidelines §1(E)(6) (citing Ind. Code §§31-17-4-4, 35-42-3-4). It is particularly troublesome that the violation in this case resulted in a reduction in the time spent together by Robert and the children. See Ind. Parenting Time Guidelines § 1(C)(2) ("If an adjustment results in one parent losing scheduled parenting time with the child, "make-up" time should be exercised as soon as possible. If the parents cannot agree on "make-up" time, the parent who lost the time shall select the "make-up" time within one month of the missed time."); id. § 1(E)(5) ("A child has the right both to support and parenting time.")

However, on the presented issue, whether the trial court abused its discretion in denying Robert's petition, we cannot say that the trial court abused its discretion in finding that a change in custody was not in the best interests of the children. This finding alone supports the trial court's judgment denying Robert's petition. Ind. Code § 31-17-2-21(a) (1).

Conclusion

The trial court did not abuse its discretion in denying Robert's petition for

modification of custody.

Affirmed.

SULLIVAN, J., and BARNES, J., concur.